

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
ON STATE RATE REVIEW PROCESS**

I. INTRODUCTION

The National Association of State Utility Consumer Advocates (“NASUCA”)¹ submits these comments on the Notice of Proposed Rulemaking concerning the state rate review mechanism for non-rural carriers that was created by the October 27, 2003 Order on Remand (FCC 03-249) in this proceeding. In the Order on Remand, the Federal Communications Commission (Commission”) decided issues raised in the Recommended Decision of the Federal-State Joint Board on Universal Service (“Joint Board”), released October 16, 2002 (“Recommended Decision”).² In the Recommended Decision, the Joint Board had responded to several issues referred by the Commission as a result of the Tenth Circuit Court of Appeals remand of the Commission’s high-cost support mechanism for non-rural telephone companies.³

¹ NASUCA is an association of 44 consumer advocates in 42 states and the District of Columbia. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

² FCC 02J-2, 17 FCC Rcd 20716 (2002).

³ *Qwest Corp. v. FCC*, 258 F.3d 1191 (Tenth Cir. 2001) (“*Qwest*”).

In the Order on Remand, *inter alia* the Commission adopted an “expanded certification process” for non-rural carrier interstate universal service support, in order to better ensure reasonable comparability between rural and urban rates. In this process, each state will “provide information to the Commission regarding the comparability of the rates in rural areas within the state to urban rates nationwide.”⁴ In order to assess the comparability of non-rural carriers’ rural rates, the Commission adopted a benchmark rate that is set at the national urban average plus two standard deviations.⁵ Currently, the national average rate is \$23.38 and the benchmark rate would be \$32.28.⁶

In the expanded certification process, if its rural rates fall within the rate benchmark of two standard deviations, the state will so certify and the rates will be presumed “reasonably comparable.”⁷ States whose rates are above the benchmark must provide rate data for rural residential consumers demonstrating the lack of comparability and detail a proposed course of action to address the failure to achieve comparability.⁸ If a state does not follow the certification process, no high-cost funding will be provided to its non-rural carriers.⁹

It is important to recognize that only a limited number of states currently receive high-cost funding for non-rural carriers. According to the December 2003 Monitoring

⁴ Order on Remand, ¶ 89.

⁵ Id.; see also id., ¶ 80.

⁶ Id., ¶ 80 and n. 309.

⁷ Id., ¶ 90. A state can put forward information to show that, despite the benchmark finding, its rural rates are nonetheless not reasonably comparable. Id. But the state must then come up with an action plan to produce comparability. Id.

⁸ Id. A state can put also forward information to show that, despite the benchmark finding, its rural rates are reasonably comparable to the urban rates. Id.

⁹ Id., ¶ 92.

Report (Table 3.25), in 2003 non-rural carriers in only fourteen jurisdictions received high cost support.¹⁰ Of that support, the support received in six jurisdictions is entirely “hold-harmless” support, which is being phased out.¹¹ This leaves eight states receiving high cost support based exclusively on the high cost model.¹²

Under the Order on Remand, all states -- both those currently receiving high-cost funds for their non-rural carriers and those not currently receiving funding -- will be able to request additional federal support. That additional support will go, however, only to states that show that their rural rates are not comparable to nationwide urban rates and also show that current state support *and the state support included in the state- proposed course of action* will fail to achieve comparability.¹³ NASUCA would hope that the number of states in this situation would be small.

It is important to remember, as the Commission explicitly holds, that the findings in the Order on Remand apply only to non-rural carriers.¹⁴ Neither the findings, nor the proposals, nor NASUCA’s comments here should be considered outside that context. This is because of the fundamental differences between non-rural carriers and rural carriers.¹⁵

¹⁰ Alabama, California, Kentucky, Maine, Mississippi, Missouri, Montana, North Carolina, Ohio, Puerto Rico, Texas, Vermont, West Virginia and Wyoming.

¹¹ California, Missouri, North Carolina, Ohio, Puerto Rico and Texas.

¹² Alabama, Kentucky, Maine, Mississippi, Montana, Vermont, West Virginia and Wyoming.

¹³ Clearly, the state proposal should not depend entirely on additional federal funds. If the state has already taken all reasonable action -- including the adoption of an intrastate universal service fund -- then additional federal funds must be considered.

¹⁴ Entry on Remand, ¶ 1.

¹⁵ “The Rural Difference,” Rural Task Force White Paper 2 (January 2000) (available at <http://www.wutc.wa.gov/rtf>); see Fourteenth Report and Order, ¶ 17.

In the NPRM, the Commission seeks comment on whether to require the states to provide additional data in the certification process; on the role of local calling areas in the certification process; on how to treat state requests for further federal action;¹⁶ and on whether to reward states that adopt explicit intrastate support mechanisms, “without regard to the achievement of rate comparability.”¹⁷ NASUCA briefly comments on each of these issues.

II. THE COMMISSION SHOULD NOT REQUIRE, BUT SHOULD PERMIT, ADDITIONAL STATES TO FILE INFORMATION.

The Commission asks whether it should require “all states” to provide additional data in the certification process.¹⁸ As the Commission notes, it has required only states failing to show that their rural rates for non-rural carriers are reasonably comparable under the benchmark, and required states seeking to show a lack of comparability despite meeting the benchmark, to submit detailed rural rate information.¹⁹ The Commission requests comment on whether states should also be required to provide information on business rate data, rate data for non-rural areas served by non-rural carriers, and other rate data.²⁰

¹⁶ NPRM, ¶¶ 93-96. The Commission proposes a model to be used in state requests for additional federal action. *Id.*, ¶¶ 122-124.

¹⁷ *Id.*, ¶ 108.

¹⁸ *Id.*, ¶ 109.

¹⁹ *Id.*

²⁰ *Id.*, ¶¶ 110-111.

There does not appear to be any reason to *require* all states to file such data.²¹ Much of the data is available from other public sources. Yet if the Commission were to put forth a template for the information, and *request* that states -- whether or not the state is otherwise required to provide the information -- this would be a useful tool for further proceedings.²²

III. CALLING SCOPES SHOULD BE INCLUDED IN THE RATE REVIEW PROCESS

The Act directs that rural customers should receive reasonably comparable service at reasonably comparable rates to that received by customers in urban areas.²³ As long ago as the First Report and Order, the Commission recognized that local calling areas were a key factor in determining whether rural rates are reasonably comparable to urban rates: “[R]ural consumers who must place toll calls to contact essential services that urban customers may reach by placing a local call cannot be said to pay ‘reasonably comparable’ rates for local telephone service when the base rates of the service are the same in both areas.”²⁴

Yet in the Order on Remand the Commission has again evaded the issue, by not including any specific reference to scope of calling within the basic service rate template.²⁵ States are, however, permitted to consider local calling areas when reviewing

²¹ The Commission also asks whether it should require states to report on their efforts to eliminate implicit intrastate support. *Id.*, ¶ 112. For the reasons set forth in Section V., below, such a requirement goes beyond the directives of the Act.

²² *Id.*, ¶ 109. The states that chose not to respond would have to be identified, in order to accurately assess the value of the combined information.

²³ 47 U.S.C. § 254(b)(3).

²⁴ First Report and Order, 11 FCC Rcd 7920 (1996), ¶ 114.

²⁵ Order on Remand, ¶ 87.

whether rates in those areas are comparable to urban rates.²⁶ In the NPRM, the Commission calls for comment on the role of calling scopes in the rate review process.²⁷

No comments in this docket dispute that almost all urban customers have broad local calling scopes, i.e., the areas where calling is not toll are both geographically extensive and include large numbers of customers.²⁸ By contrast, there are many customers of non-rural telephone companies who are located in rural areas who have restricted local calling areas, i.e., the areas where calling is local are geographically limited and include few other customers. It should be noted that local calling is a fundamental part of basic local exchange service; it is not an enhancement or an additional service that is optional, or available at extra charge, at least in most urban areas.

Thus the Commission must consider calling scope issues in the rate review process. For example, an interested party might challenge a state certification that the state's rural rates for non-rural carriers are within the benchmark, arguing that the rates are not, as presumed, "reasonably comparable," given limited calling scopes within the state.²⁹ Or a party could argue that a state whose rates were above the benchmark were actually even less reasonably comparable because of calling scope issues, or could challenge the state's proposed course of action to address the failure to achieve comparability because of the failure to address calling scope issues.³⁰ Or the party could

²⁶ Id.

²⁷ NPRM, ¶ 113.

²⁸ This is true even where local service is provided on a measured-rate basis; the area and population reachable using that measured rate is typically quite large.

²⁹ See id., ¶ 90.

³⁰ Id.

challenge the state-supplied information that attempts to show that, despite the benchmark finding, its rural rates are reasonably comparable to the urban rates.³¹

Further, the state itself might put forward information to show that, despite a finding that its rates are below the benchmark, its rural rates are nonetheless not reasonably comparable,³² because of limited local calling scopes. The state would also then have to produce an action plan to ensure comparability.³³

As noted above, however, the states that are candidates for this process are quite limited in number. Thus the opportunity to include calling scope issues in the rate review process will also likely be limited.

NASUCA presents the following recommendations for the adoption of calling rate standards that can be used in the state rate review for high-cost support for non-rural carriers. This standard is arrived at, first, by considering the alternatives.

First, it would not likely be feasible to require reasonable comparability between urban and rural customers in terms of the number of customers who can be reached as a local call. Requiring that each rural customer be able to reach through a local call a number of customers “reasonably comparable” to the local calling area of a large metropolitan exchange would entail a small rural exchange of, say 500 access lines being able to reach out to much of the state, over a great distance, beyond most customers’ needs for local calling.

³¹ Id.

³² Id.

³³ Id.

It would also be difficult to “normaliz[e] the impact of calling scopes on rates.”³⁴ Where, as in most of the country, local calling is available on a “flat rate,” or unlimited usage for a fixed monthly charge, basis, the incremental cost to a customer of an additional call within the local calling area is zero.³⁵ On the other hand, with a constricted local calling area, the customer’s decision to make calls outside the immediate local area is measured against the incremental cost of the toll call, usually billed at intraLATA toll rates.³⁶ Consumers’ reactions to this incremental cost will vary from consumer to consumer and month to month. It would be difficult to pin down a “normal” cost of a constricted local calling area.

There is another way to establish a rural local calling area that is reasonably comparable to an urban local calling area. That is a functional approach, under which a “reasonably comparable” local calling area for a rural exchange would be defined as the ability to reach, as a local call: 1) each contiguous exchange; 2) the exchanges for any county seat that serves any part of the exchange; 3) a metropolitan exchange, if the wire center is within the MSA of a metropolitan exchange and/or within a state-specified distance from the metropolitan exchange.³⁷ NASUCA believes that almost all urban

³⁴ NPRM, ¶ 113.

³⁵ Those who have, in the past, attacked flat rate calling as an uneconomic non-usage-based option, should be aware that the use of “all you can eat” options is spreading to clearly competitive markets -- first to the Internet, and now to the “all distance” calling increasingly available from both RBOCs and CLECs, *in order to meet the needs of consumers*. See http://www.theneighborhood.com/res_local_service/jsps/default.jsp (MCI Neighborhood) (accessed January 12, 2004); http://www05.sbc.com/Products_Services/Residential/ProdInfo_1/1..1091--12-3-13.00.html (SBC National Connections) (accessed January 12, 2004).

³⁶ Or the call is made with a wireless phone on an “all distance” plan.

³⁷ For example, in Ohio, the Ohio Consumers’ Counsel has proposed that exchanges within 22 miles of a metro exchange should have local calling to the metro exchange. See *In the Matter of the Commission’s Extended Area Service Rules Found in Chapter 4901:1-7, Ohio Administrative Code*, PUCO Case No 01-2253-TP-ORD, Comments of the Ohio Consumers’ Counsel (January 29, 2002) at 13-14 (accessible at <http://dis.puc.state.oh.us/dis.nsf/0/C48592B95461E14985256B52006D97CD?OpenDocument>).

exchanges have local calling areas that meet this standard. Each portion of the standard is discussed more fully below.

As to contiguous exchanges, to put it simply: For urban consumers, a call across the street, or to a neighbor, is always a local call. Unless contiguous rural exchanges are included in the local calling area, there will always be situations where calls that cross the artificial line that is the exchange boundary -- including calls to neighbors or across the street -- will be “long distance” toll calls. Each rural exchange, in order to have service reasonably comparable to that in urban exchanges, should, at a minimum, have all contiguous exchanges included in its local calling area.

The next level involves county seat calling. There are three basic levels of government in most states: local (city, village or township), county and state. In most instances, local government is within a consumer’s home exchange. Where local government is not within the home exchange, it is most likely within the contiguous exchange. Thus local calling to contiguous exchanges will allow consumers local telephone access to their local government.

Depending on the size of the state, the state capital is a true “long distance” call for most of the state. County government, although much closer than the state capital, may not be within a contiguous exchange for many rural customers. All citizens should be able to call their county government as a local call, and county government should be able to call its constituents as a local call. This is particularly important for rural counties.

Finally, “rural” customers who live near a metropolitan area -- in terms of absolute distance as determined by the state -- or within the MSA of the metropolitan

exchange should be able to call the metro exchange as a local call, just as the residents within that metro exchange are able to. Among other things, this -- like the other standards proposed here -- will also ensure rural exchanges will remain or will become reasonably comparable *to each other*.

Under NASUCA's proposal, a state would have to certify that the rural areas served by its non-rural carriers enjoy local calling areas -- or their equivalent -- that include contiguous exchanges, county seat exchanges and metro exchanges (where applicable). If the state is unable to so certify, then it should present a plan to make the local calling areas reasonably comparable, or present reasons why the local calling areas cannot be made reasonably comparable.³⁸

IV. THE COMMISSION SHOULD NOT DEVELOP PROCEDURES FOR STATE REQUESTS FOR FURTHER ACTION.

The Commission seeks comment on the specifics of a process by which states could apply for further federal support "based on a showing that federal and state action together are not sufficient to achieve reasonable comparability of basic service rates in rural, high-cost areas served by non-rural carriers...."³⁹ As noted above, the number of states able to make such a showing should be limited.

This limited possibility argues against the Commission attempting to "clearly define" the process.⁴⁰ This is especially true in light of the Commission's recognition that

³⁸ For example, if the customers of an exchange had voted *not* to expand their local calling area due to the increased cost, the state could not be required to expand the local calling area against the customers' wishes.

³⁹ Order on Remand, ¶ 93.

⁴⁰ Order on Remand, ¶ 95.

“flexibility in making the required showings is appropriate because it is not possible at this time to predict all future circumstances that may require further federal action, and retaining flexibility will permit states to adapt their showings to fit the circumstances.”⁴¹ NASUCA submits that the states do not need the detailed guidance that the Commission seeks to provide. For example, the Commission should leave it up to individual states to specify the type of federal action that they request.⁴² The Commission should also leave it up to individual states to propose an amount for that support.⁴³

The Commission first requests comment, however, on procedures, such as the timing of requests for additional federal action. NASUCA agrees that such requests should accompany the annual state rate certification. NASUCA recommends that, after the first certification, the state should be required, at a minimum, to report on the progress of state-level efforts; to certify that conditions had not, despite those efforts, changed; and to propose additional action to fix the problem.

The Commission goes too far in proposing “that a state that has not [adopted explicit intrastate support mechanisms] cannot be deemed to have taken all reasonably possible steps to support rate comparability within the state.”⁴⁴ As explained in the next section, the Act does not require intrastate universal service support mechanisms to be explicit. Equally importantly, a key effect of the Commission’s actions in adopting

⁴¹ Id.

⁴² Id., ¶ 121.

⁴³ Id., ¶ 122. The Commission could cap that amount, but the proposal to have the additional support amount equal a set percentage of wire center costs that are in excess of two standard deviations above the average cost per line (id., ¶ 122-125) is not adequately justified.

⁴⁴ Id., ¶ 119. NASUCA also opposes the Commission’s proposals -- based on this fascination with explicit intrastate support -- for the minimum content for applications for additional federal support. Id., ¶ 120.

explicit interstate support mechanisms has been to increase the cost of basic service. It is dangerous to assume that Congress intended such a result to occur on the intrastate level.

V. THE COMMISSION SHOULD NOT ADOPT INDUCEMENTS FOR STATES TO ELIMINATE IMPLICIT INTRASTATE SUPPORT.

The Commission asked many questions about how to implement inducements for states to eliminate implicit universal service support in intrastate rates.⁴⁵ NASUCA will not answer those questions, because the Commission should not adopt *any* such mechanism.

The Commission's rationale for such mechanisms is that "section 254 states a clear preference for explicit, rather than implicit, support, but the 1996 Act does not require states to adopt explicit universal service support mechanisms."⁴⁶ This misstates the Act: The Act expresses a clear preference for explicit interstate support,⁴⁷ but omits "explicitness" from the list of characteristics sought for intrastate rates.⁴⁸

Given this fundamental flaw in the Commission's reasoning, not much more need be said. It should be noted, however, that the Commission's proposal to give states inducements for removing implicit intrastate support *regardless of the impact on whether rates are reasonably comparable*, means that states will be rewarded for actions that make rural rates *less* comparable to urban rates. This allows a Commission-inflated preference for explicit support to violate the fundamental directive of the Act that rates be reasonably comparable, and cannot be accepted.

⁴⁵ Id., ¶¶ 126-132.

⁴⁶ NPRM, ¶ 127.

⁴⁷ 47 U.S.C. § 254(e).

⁴⁸ 47 U.S.C. § 254(b)(5), (f).

CONCLUSION

The Commission should adopt NASUCA's recommendations.

Respectfully submitted,

David C. Bergmann
Chair, NASUCA Telecommunications Committee
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574
bergmann@occ.state.oh.us

NASUCA
8300 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

January 14, 2004